No. 89-137

In The

Supreme Court of the United States

October Term, 1989

DONALD A. LOWRY,

Petitioner,

v.

BANKERS LIFE AND CASUALTY RETIREMENT PLAN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS RESTATED

1. Whether the holding of the Court of Appeals for the Fifth Circuit, applying an abuse of discretion standard rather than a *de novo* standard in reviewing a denial of benefits by a Plan Administrator given discretionary responsibility under the Plan to determine eligibility for benefits and to construe the Plan, is in conflict with this Court's holding in *Bruch* and the holding of the Court of Appeals for the Fourth Circuit in *Boyd*.

2. Whether the holding of the Court of Appeals for the Fifth Circuit, declining to consider an allegation of Plan Administrator conflict of interest, raised for the first time on petition for rehearing in the Court of Appeals, is in conflict with this Court's holding in *Bruch*.

3. Whether the holding of the Court of Appeals for the Fifth Circuit, affirming a finding that the Plan grants the requisite discretionary authority to the Plan Administrator, is in conflict with this Court's holding in *Bruch*.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Donald A. Lowry and the Respondents Bankers Life and Casualty Retirement Plan, Savings Investment Plan, Bankers Life and Casualty Company, Union Bankers Insurance Company, Robert P. Ewing, Chester M. Lozowski, Paul Janus, Barth Murphy, Paul Higdon, Jack Zimmer, Tom Dunphy, Jim Bentle, Jack Gardiner and Robert Shaw.

Union Bankers Insurance Company is a Texas company, wholly owned by Bankers Life and Casualty Company, an Illinois company, both part of the I.C.H. Companies insurance company system, owned by I.C.H. Corporation, a Delaware corporation (I.C.H. is not a party to this case).

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BRIEF IN OPPOSITION

Respondents, Bankers Life and Casualty Retirement Plan, et al., respectfully pray that this Court deny the Petition for Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the District Court, the main opinion of the Court of Appeals and the opinion of the Court of Appeals denying rehearing are set forth in full as appendices to the Petition.

STATEMENT OF THE CASE

Petitioner Donald A. Lowry has had five and now seeks a sixth review of his claim for additional retirement benefits from Respondents Bankers Life and Casualty Retirement Plan and Savings Investment Plan (collectively the "Plan"). In 1982 and again in 1983, Petitioner sought and received projections of his retirement benefits under the Plan, anticipating his retirement some years later. The Plan Committee Secretary, Respondent Chester M. Lozowski ("Lozowski"), projected a lump sum retirement benefit of nearly a quarter of a million dollars, based, consistent with uniform practice under the Plan, on Petitioner's salary and personal production commission income. Also consistent with uniform practice, the projection was not based on the more than $500,000 of overwrite commissions Petitioner was paid for the sales efforts of others in the nine-month period in 1979 during which Petitioner was an independent general agent for Respondent Union Bankers Insurance Company ("Union Bankers"), a subsidiary company of Respondent Bankers Life and Casualty Company ("Bankers"). Although not at the time either of these projections was made, Petitioner later claimed entitlement to an additional lump sum benefit of $384,533.96 based upon the inclusion of such

overwrite commissions in the compensation base for purposes of calculating benefits. Petitioner asserted his belief that his general agency overwrite commissions should be included even though, as the district court found, he knew general agents had never been included in Bankers' IRS-qualified employee pension plans. (Pet. App. 8c). Upon his retirement in 1986, Petitioner was paid a lump sum retirement benefit, based upon his salary and personal production commissions, of $253,788.98. His relentless pursuit of the extra $384,533.96 now extends to this Court.[1]

In 1984, 1985 and 1986, Plan Committee Secretary Lozowski informed Petitioner that general agency commissions were never included in the employee pension funds. In 1986, the full committee (the remaining respondents in this case) (Lozowski and the Committee hereinafter sometimes called "Administrator"), vested under the Plan with authority to determine eligibility for benefits and to interpret and construe the Plan, reviewed and

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[1] Petitioner never incurred a "break in service" under the Plan and received full benefits based on his salary and personal production commissions. The dispute in this case has not been whether Petitioner would remain in the pension program while he was setting up the general agency in 1979, but what payments to him would be included in the compensation base for benefit calculations. Petitioner's reference to Mr. Coffman (Pet. at 4), who did not testify at trial, is irrelevant to the interpretation of the Plan, but is so highly misleading that the pertinent transcript of Petitioner's trial testimony on this subject, (Tr. 38-39, 103-104 and 122-123) taken from the Joint Appendix on Appeal, is reproduced in *Appendix A* hereto.

denied Petitioner's claim. This review included the participation of outside counsel for Petitioner and Respondents. The complete written dialogue, including the legal basis for refusing to include non-employee income in Bankers' IRS-approved qualified employee pension plans, is in the record of the trial court and was before the court below on appeal. After exhausting his review rights under the Plan, Petitioner filed this action in 1987. Petitioner had a full bench trial in February 1988, an appeal before the United States Court of Appeals for the Fifth Circuit and, in 1989, after this Court's decision in *Bruch*, a full and complete assessment of his claim by the Court of Appeals in light of *Bruch*.

The court below recognized the inappropriateness of this case as a vehicle for a general pronouncement beyond the facts of this case (Pet. App. 8a, n.3), but also recognized the serious consequences to the Plan and other beneficiaries if Petitioner's view prevailed (Pet. App. 7a). For convenience, we refer to the original opinion of the court below as *Lowry I* (reported at 865 F.2d 692 and reprinted at Pet. App. A) and to the post-*Bruch* opinion of the court below as *Lowry II* (reported at 871 F.2d 522 and reprinted at Pet. App. B).

REASONS FOR DENYING THE WRIT

I. NO CONFLICT OF AUTHORITY EXISTS TO WARRANT REVIEW BY THIS COURT BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS APPLIED THE CORRECT STANDARD TO REVIEW THE ADMINISTRATOR'S DECISION AND THE ADMINISTRATOR COMMITTED NO ERROR OF LAW IN INTERPRETING THE PLAN.

There are no special or important reasons, under Rule 17 of this Court's rules or otherwise, to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The court below in *Lowry II* rendered one of the first decisions on the effect of this Court's recent decision in *Firestone Tire & Rubber Co. v. Bruch*, ___ U.S. ___, 109 S.Ct. 948 (1989) ("*Bruch*"). The Court of Appeals properly applied this Court's holding in *Bruch* of an abuse of discretion standard in reviewing the Administrator's decision denying benefits and its ruling is consistent with other appellate and district court post-*Bruch* decisions. As this Court's first major decision on the standard of review of ERISA plan determinations, *Bruch* relied upon substantial case law development in the lower courts in the 14 years since the passage of ERISA. Even if this were a case in which the court below misapplied *Bruch*, which it is not, it is much too early for this Court to fine-tune *Bruch* or even to consider taking a case on certiorari which presents the same issues as *Bruch*.

Moreover, the issue of whether the Administrator in this case committed an error of law has been reviewed already by the courts below, once by the district court and twice by the Court of Appeals. In each instance,

Petitioner was unable to prove that the Administrator committed an error of law in applying the rules of construction in his interpretation of the Plan. There is no conflict or inconsistency with any decision of this Court or any appellate court. There is no reason for review by this Court and the Petition should be denied.

A. THE STANDARD OF REVIEW APPLIED IN *LOWRY II* PRESENTS NO CONFLICT OF AUTHORITY.

The Fifth Circuit Court of Appeals in *Lowry II* correctly tied the standard for review of the Administrator's decision to whether the Administrator had been granted the requisite discretionary authority. This Court held in *Bruch*:

> Consistent with established principles of trust law, we hold that a denial of benefits challenged under §1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Bruch, ___ U.S. at ___, 109 S.Ct. at 956.

The threshold issue in determining the appropriate standard of review does not turn, as Petitioner asserts, on whether the administrator allegedly makes an error of law. Petitioner's rationale seems to be that, notwithstanding any discretion granted the administrator, the administrator may not act with discretion on the law governing the construction of the Plan. Petitioner argues that because the Administrator here incorrectly applied the

law governing construction of contracts, the reviewing Court of Appeals must review the matter *de novo*.

There is no language or reasoning in *Bruch* to support Petitioner's argument. In fact, this Court in *Bruch* explained that under the law of trusts, which is the body of law in which ERISA law is rooted, "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." *Id.* at ___, 109 S.Ct. at 954. Noting the consistency between trust and pre-ERISA law, this Court stated the principle governing the interpretation of benefit plans before ERISA's enactment:

> If the plan did *not* give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee's claim as it would have any other contract claim – by looking to the terms of the plan and other manifestations of the parties' intent.

Bruch, ___ U.S. at ___, 109 S.Ct. at 955 (emphasis added).

Reasoning that it would be inappropriate to read ERISA as allowing "a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted," the Court declined to impose an inflexible standard which would lead to arbitrary and capricious results in many cases. *Id.* at ___, 109 S.Ct. at 956. Rather, acknowledging that a claim "under an ERISA plan is likely to turn on the *interpretation of terms* in the plan at issue," this Court held that the administrator's interpretation will *not* be reviewed *de novo* if that administrator was granted discretion to make such a decision. *Id.* (emphasis added).

Petitioner's arguments are quite similar to arguments that prevailed in the appellate court in *Bruch* – but not in this Court. While the Court of Appeals for the Third Circuit in *Bruch* based its decision to employ a *de novo* standard on factors such as whether a question of law was before the plan administrator or whether the plan was funded versus unfunded, this Court rejected such factors as the proper basis for such a decision. *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 144, 148 (3d Cir. 1987). Instead, this Court adopted as the *only* determinative factor the grant of discretionary authority to the plan administrator; the other factors – while important to a determination at the secondary level – are not threshold issues but are merely to be considered in deciding whether the administrator acted within his discretion. *Bruch*, ___ U.S. at ___, 109 S.Ct. at 956.

There is no validity to Petitioner's argument that *Bruch* requires a court to review the interpretation of a plan by an administrator, notwithstanding the grant of discretion, under a *de novo* standard. The cases cited by Petitioner fail to support this argument.

Petitioner cites *Short v. Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567 (8th Cir. 1984), for the proposition that an error of law should be reviewed "with a legal *de novo* review and *not* by an arbitrary and capricious fact review test." (Pet. at 9) (emphasis is Petitioner's). However, *Short* did not so hold. In this pre-*Bruch* case, the Court of Appeals for the Eighth Circuit merely stated that "in reviewing a decision of the trustees, a federal court is *not* to hold a *de novo* factual hearing which would allow for the admission of new evidence. Rather, the conflict must focus on the

evidence which was before the trustees when the final decision was made." *Short*, 729 F.2d at 571. The court affirmed the district court's reversal of the plan administrator, stating that the court was correct in its conclusion that the claimants were employees under the terms of the benefit plan. *Id.* at 573. Nowhere in its *Short* opinion did the Court of Appeals for the Eighth Circuit hold that when it reviews a question of law, it must conduct a "*de novo*" review.

Furthermore, the holding of the Court of Appeals in *Lowry II* is *not* in conflict with that of the Fourth Circuit in *Boyd v. Trustees of the United Mine Workers Health & Retirement Funds*, 873 F.2d 57 (4th Cir. 1989), as Petitioner suggests. (Pet. at 10). Contrary to Petitioner's assertion, *Boyd* does not set out a rule that legal questions are outside an administrator's discretion and must be reviewed *de novo*. Rather, *Boyd* follows *Bruch* in a fashion identical to *Lowry II*.

The issue on appeal in *Boyd* was the plan administrator's interpretation of coverage for an injured mine worker under the union's disability benefits plan. Citing *Bruch*, the Court in *Boyd*, as in *Lowry II*, first determined whether the plan administrator has been granted discretionary authority to determine eligibility and to construe the plan terms. *Boyd*, 873 F.2d at 59. Finding that such discretion was granted, the Court in *Boyd*, as in *Lowry II*, then applied the abuse of discretion standard required by *Bruch*. *Id.* Even though the issue on appeal was whether the administrator's interpretation of the plan was in accord with controlling case law – an error of law according to Petitioner (Pet. at 10) – the Court of Appeals

reviewed the administrator's decision under the abuse of discretion standard. *Boyd*, 873 F.2d at 60.

Certainly the Court of Appeals in *Boyd* acknowledged the importance of an administrator's following precedential case law that "sets bounds on the *range* of discretion that the Pension Plan confers on the Trustees to deny claims. . . ." *Id.* at 60 (emphasis added). But that court did *not*, as Petitioner suggests, hold that the abuse of discretion standard was inapplicable, and that a *de novo* review applied, merely because some legal question was presented. Rather, the court recognized that the range of discretion may be limited by legal principles and reviewed the exercise of discretion in light of the applicable legal principles.

Such an analysis of the administrator's decision is almost identical to that in *Lowry II*. In *Lowry II*, the Court of Appeals did not refuse to review legal issues, or somehow obfuscate the possibility of the Administrator ignoring or incorrectly applying the relevant laws of construction. The Court acted in conformance, not in conflict, with the relevant case authority.

B. THE COURTS BELOW HAVE REVIEWED THE ALLEGATIONS OF AN ERROR OF LAW BY THE ADMINISTRATOR IN INTERPRETING THE PLAN AND HAVE FOUND NO ERROR.

This Court does not need to take this case on certiorari to do what the courts below have done three times already – review the Administrator's decision denying benefits for a possible error of law. While Petitioner finds a new fabric in which to cloak his allegation of an error of

law, it is the same worn argument he asserted and lost in the district court and twice in the court below, first on initial appeal and then in a post-*Bruch* attempt at rehearing. Hence, in addition to having absolutely no legal basis for asserting that controlling law requires a *de novo* review of the Administrator's decision for an error of law, Petitioner has no basis for bringing this already reviewed alleged error to this Court's attention.

On the main appeal and on petition for rehearing before the Fifth Circuit Court of Appeals, both sides fully briefed the issue of whether the Administrator construed the Plan within the proper legal confines.[2] The Court in *Lowry II* pointed out that it had reviewed the Administrator's decision already, and stated, "[o]ur earlier opinion and the opinion of the district court make clear that the plan administrators in this case did not abuse their discretion." *Lowry II*, 871 F.2d at 525 (Pet. App. 6b).

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[2] For example, in Appellant's Petition for Rehearing, Petitioner argued that the Fifth Circuit Court's decision in *Lowry I* "is in direct conflict with *Dennard* and *Firestone* as well as the numerous decisions cited herein and in Appellant's original Brief for the proposition that ERISA trustees must follow the common law of contractual construction, using and respecting the Parole [sic] Evidence Rule, in determining the correct legal meaning of a plan." Appellant's Petition for Rehearing at 13. Appellees responded, as they had on the main appeal, that no ERISA decision ever applied or referred to the "parol evidence rule" or the so-called "Rule of Four Corners," that such doctrines were inapposite in ERISA cases and that

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In *Lowry I*, the court conducted a complete review of the Administrator's decision construing the Plan, which review included a determination of the correct interpretation of the Plan and the factors underlying the Administrator's interpretation. *Lowry I*, 865 F.2d at 694 (Pet. App. 5a and 6a). Despite Petitioner's repeated attempts to call Plan language in this case "clear," the courts below did not agree. After analyzing the Plan language and the Administrator's interpretation, the Court found that "the language is not crystal clear on its face and does not exist in a vacuum," and affirmed the district court's upholding of the Administrator. *Lowry I*, 865 F.2d at 695 (Pet. App. 7a). Both *Lowry I* and the district court considered whether the Administrator's interpretation of the Plan was a legally correct one. *Lowry I*, 865 F.2d at 694-6. (Pet. App. 5a); *Lowry v. Bankers Life & Cas. Retirement Plan*, 678 F.Supp. 635, 640-2. (Pet. App. 9c and 10c).

The references by Petitioner to the statute governing judicial review of agency determinations is yet another attempt to dress up the bare assertions that the Court below reviewed the Administrator's decision under the wrong standard. (Pet. at 10-11). Aside from the fact that Petitioner fails to explain why in an ERISA action an

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this argument was flatly inconsistent with *Bruch*: " 'The terms of trusts created by written instruments are determined by the provisions of the instrument *as interpreted in light of all the circumstances* and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.' Citing Restatement (Second) of Trusts §4, Comment d (1959) (emphasis added)."–Response Brief of Appellees at 16-17, quoting *Bruch*, ___ U.S. at ___, 109 S. Ct. at 955.

analogy to a statutory imposition of review for government agency decisions is appropriate, Petitioner also ignores *Bruch*'s command that "[i]n determining the appropriate standard of review for actions under §1132(a)(1)(B), we are guided by principles of *trust* law." *Bruch*, ___ U.S. at ___, 109 S.Ct. at 954 (emphasis added).[3]

Moreover, Petitioner fails to discuss the fact that *Pennzoil*, the case he cites as the leading decision in the Fifth Circuit regarding the allegedly appropriate standard of review, actually *supports* the Administrator's application of the law of contract construction. *See Pennzoil Co. v. F.E.R.C.*, 789 F.2d 1128 (5th Cir. 1986). The court in *Pennzoil* stated that in construing a contract, while one must consider the language of the contract, extrinsic evidence "is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." *Id.* at 1140, quoting *Pennzoil Co. v. F.E.R.C.*, 645 F.2d 360, 388 (5th Cir. 1981), *cert. denied* 454 U.S. 1142, 102 S.Ct. 1000 (1982). *Pennzoil* adds nothing to an analysis of the appropriate standard of review in this non-administrative proceeding but, if considered, significantly undermines Petitioner's assertion that the Administrator's decision, thrice affirmed in the courts below, was premised on an error of law in interpreting the Plan in this case.

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[3] Petitioner's reliance on *Burns v. Louisiana Land & Exploration Co.*, 870 F.2d 1016 (5th Cir. 1989) (Pet. at 13, n.6) is likewise inapposite. If the Rule of Four Corners has any application to this case, it is to confine Petitioner to a reasonable zone of legal authority for this case. *Burns* is, as conceded by Petitioner, "outside ERISA" and otherwise provides no authority for any issue before this Court. (*See supra* note 2.)

C. *LOWRY II* IS CONSISTENT WITH THE POST-*BRUCH* DECISIONS BY OTHER APPELLATE AND DISTRICT COURTS.

In addition to the fact that *Lowry II* properly follows this Court's decision in *Bruch*, this Court should deny the Writ of Certiorari since *Lowry II* is consistent with at least 17 decisions of various United States Courts of Appeal and more than 20 decisions of various United States District Courts which, subsequent to *Bruch*, have either applied, interpreted or cited *Bruch* and its new standards of review. *See Appendix B* hereto. Following *Bruch*, these courts properly held that in determining which standard of review to apply, a court must first determine whether the administrator or fiduciary of the plan in dispute has been granted "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Bruch*, ___ U.S. at ___, 109 S.Ct. at 956. If the administrator or fiduciary possesses the requisite discretionary authority, as did the Administrator here, these courts properly apply *Bruch* and hold that a *de novo* standard of review does not apply.

The United States Court of Appeals for the First Circuit, in *Curtis v. Noel*, 877 F.2d 159 (1st Cir. 1989), applied *Bruch* to an action in which a retired employee of an insurance company sought an upward recalculation of his retirement benefits, claiming that he was entitled to additional benefits based upon "incentive compensation" which he had received in addition to his annual salary. *Id.* at 160-61. Plaintiff's "incentive compensation," much like Petitioner's in this case, consisted of commissions computed upon a percentage of the overall insurance premiums paid to his employer. *Id.* at 160. In refusing to

include this special remuneration in the calculation of plaintiff's retirement benefits, the administrator of the retirement plan relied upon a provision of the retirement plan. Under such provision, "special remuneration which would not ordinarily be considered compensation for job-related services" would be excluded from the computation of "annual earnings" used in calculating retirement benefits. *Id.* at 161. In making this determination, the administrator reasoned that the "incentive compensation" at issue fell within the exclusion since the payments were illegal under a state statute. *Id.*

The court in *Curtis* held that the administrator acted properly in denying plaintiff the additional retirement benefits sought, applying a deferential standard of review since the administrator possessed the discretionary authority to make such determinations. *Id.* In so holding, the court properly applied the teaching of *Bruch* as stating that "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. . . .A trustee may be given power to construe disputed or doubtful terms, and in such instances the trustee's interpretation will not be disturbed if reasonable." *Id.* at 161, quoting *Bruch*, ___ U.S. at ___, 109 S.Ct. at 952. *Cf., Burnham v. Guardian Life Ins. Co. of Am.*, 873 F.2d 486, 489 (1st Cir. 1989) (a post-*Bruch* but pre-*Curtis* decision, silent on the subject of whether the defendant insurer had discretionary authority, affirmed the district court's summary judgment which upheld the insurer's decision as reasonable regardless of whether a *de novo* or deferential standard was required by *Bruch*).

The facts of *Curtis* and those of the instant case are analogous, and the holdings are consistent with each other and with *Bruch*. As *Curtis* aptly illustrates, *Lowry II* is within the letter and spirit of *Bruch* and of other federal courts which have applied *Bruch*.

In *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 541 (8th Cir. 1989), the United States Court of Appeals for the Eighth Circuit analyzed the new standards of review enunciated in *Bruch* with respect to a class action brought by several plaintiffs against their former employer seeking a declaratory judgment that the employer's refusal to grant them severance benefits violated Section 1132(a)(1)(B) of ERISA. *Lakey*, 874 F.2d at 542. On appeal, plaintiffs claimed that the district court erred in failing to review their ERISA claim *de novo*. *Id.* at 543. The Eighth Circuit interpreted Justice O'Connor's opinion in *Bruch* as holding that a fiduciary or administrator's benefit determination is not to be reviewed *de novo* if a court determines that discretionary power had been granted to the benefit plan's fiduciary or administrator to construe its terms. *Id.* at 544. Since the employer in *Lakey* had full "power to construe the uncertain terms in its benefit plan," the court held that the *de novo* standard of review did not apply and that the district court's denial of benefits was "lawful under ERISA *so long as the decision was not arbitrary and capricious.*" *Id.* at 544-45 (emphasis added).

Petitioner's main argument for granting the writ should be rejected and the petition should be denied.

II. PETITIONER'S CONFLICT OF INTEREST ALLEGATION WAS PROPERLY REJECTED BY THE COURT OF APPEALS AND RAISES NO ISSUE UNDER *BRUCH*.

Petitioner's second argument for granting the writ (Pet. at 17) is also without merit and presents no *Bruch* issue. The Fifth Circuit Court of Appeals in *Lowry II* declined to hear on rehearing Petitioner's allegation – made for the first time on rehearing – that the Administrator was acting under a conflict of interest. This holding is entirely consistent with controlling case law and is not, by any stretch of the imagination, in conflict with *Bruch*.

The Court of Appeals in *Lowry II* acknowledged *Bruch*'s holding that an alleged conflict of interest of an administrator with discretionary authority must be considered in determining whether there is an abuse of discretion. *Lowry II*, 871 F.2d at 525 n.6, quoting *Bruch*, ___ U.S. at ___, 109 S.Ct. at 950 [sic]. *Accord, Bali v. Blue Cross & Blue Shield Ass'n*, 873 F.2d 1043, 1047, n.5 (7th Cir. 1989) (noting that under *Bruch* "the existence of a conflict of interest does not alter the applicable standard"). However, the issue must be timely raised and nothing in *Bruch* changes that requirement.

In *Lowry II*, the court below stated that "*Lowry* did not present the conflict of interest argument to us on his initial appeal, and we will not consider it now. *See, e.g. Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1549 (5th Cir. 1984)." *Lowry II*, 871 F.2d at 525. The court correctly added that the conflict of interest allegation should have been raised even under the pre-*Bruch* arbitrary and capricious standard. *Id.*

The two leading cases in the Fifth Circuit prior to *Lowry I* and *Lowry II* include alleged bias as a factor in the formulation of the arbitrary and capricious standard. *See Denton v. First Nat'l Bank of Waco, Tex.*, 765 F.2d 1295, 1304 (5th Cir. 1985); *Dennard v. Richards Group*, 681 F.2d 306, 313-314 (5th Cir. 1982). In *Denton*, the Court of Appeals, citing *Dennard*, stated that " '[W]e also view as probative of the good faith of a trustee or administrator the following factors: . . . (3) factual background of the determination by a Plan and inferences of lack of good faith, if any. *The fact that a trustee's interpretation is not the correct one as determined by a district court does not establish in itself arbitrary and capricious action*, but is a factor in that determination.' " *Denton*, 765 F.2d at 1304 (quoting *Dennard*, 681 F.2d at 314 (additional citation omitted)) (emphasis is the court's). It is noteworthy that these principles outlined in *Denton* and *Dennard* were applied by the district and appellate courts below. *See, e.g. Lowry I*, 865 F.2d at 694 (Pet. App. 5a).

In addition, the case law outside the Fifth Circuit indicates that the conflict of interest should have been raised by Petitioner at least in his initial appeal, if not at trial. The Court of Appeals for the Second Circuit explained the relevance of inquiring into the inherent dangers in a benefit plan administrator maintaining conflicting fiduciary duties. *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982), *cert. denied*, 459 U.S. 1069, 103 S.Ct. 488 (1982). *See also Deak v. Masters, Mates & Pilots Pension Plan*, 821 F.2d 572 (11th Cir. 1987) (reviewing alleged breach of duty under ERISA by administrator with fiduciary duties to both union or employee and to plan beneficiaries).

Petitioner's assertion that the Administrator operated under an "undisputed conflict of interest" (Pet. at

17) is without any basis in the record or in fact. Implicit in the district court's opinion is the lack of bias, *e.g.* "Consistent with the treatment of all employees and all general agents. . . ." *Lowry,* 678 F.Supp. at 639 (Pet. App. 8c). Moreover, this Court in *Bruch* suggested a limited approach to reviewing an alleged conflict: "Because we do not rest our decision on the concern for impartiality that guided the Court of Appeals . . . , we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries." *Bruch,* ___ U.S. at ___, 109 S.Ct. at 956.[4]

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[4] In *Lowry II,* the Court of Appeals explained that the Plan at issue does not lend itself to the type of conflict alleged in *Bruch,* and any alleged conflict should be considered only as one factor in the court's abuse of discretion review. The court stated in a footnote:

> 7. Incidentally, we note that with respect to the unfunded plan at issue in *Bruch,* "every dollar provided in benefits is a dollar spent by . . . Firestone, the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket." *Bruch v. Firestone Tire & Rubber Co.,* 828 F.2d 134, 144 (3d Cir. 1987). In contrast, the Retirement Plan in this case is a funded, defined-benefit plan. "[I]n these defined-benefit plans, the immediate impact of a decision to grant or deny benefits is on the trust itself and not on the employer; only if the total of all claims paid exceeds the actuarially anticipated amounts would benefit decisions by a trustee have a financial impact on the employer." Brief for Respondents at n. 19, *Firestone Tire & Rubber Co. v. Bruch,* No. 87-1054 (available at LEXIS, Genfed Library. Briefs File).

Lowry II, 871 F.2d at 525-526. (Pet. App. 8b).

The opinion of the court below in *Lowry II* is completely consistent with *Bruch* as to the conflict of interest issue. Petitioner has wandered far afield from the state of the law governing this issue. In the Fifth Circuit, even before *Bruch*, an alleged conflict of interest was relevant to a review of the administrator's decision. However, Petitioner here, unlike that in *Bruch*, has failed to raise the issue timely. This Court should reject Petitioner's second reason for granting a writ; Petitioner, after three reviews of this matter, should not now be allowed to raise an alleged bias on the part of the Administrator and cannot do so on the authority of *Bruch*.

III. THE COURT OF APPEALS CORRECTLY HELD THE PLAN GIVES THE ADMINISTRATOR DISCRETIONARY AUTHORITY TO DETERMINE ELIGIBILITY FOR BENEFITS AND TO CONSTRUE THE TERMS OF THE PLAN.

In *Lowry II*, the Court of Appeals, following *Bruch*, made a threshold inquiry as to whether the Plan terms granted discretionary authority to the Administrator, and concluded that they did. The Court's inquiry followed the test laid out in *Bruch*: whether "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Lowry II*, 871 F.2d at 523, quoting *Bruch*, ___ U.S. at ___, 109 S.Ct. at 956.

Petitioner's argument that the Court of Appeals erred in its holding that the requisite discretion was granted is premised on Petitioner's flawed and far-reaching reading of the holding in *Bruch*. Petitioner concocts

his own test for determining whether the plan terms grant discretion, altering this Court's holding in *Bruch*. Under Petitioner's test, a court is to ask whether the plan establishes an "independent" ERISA administrator and grants "explicit irrevocable" authority to construe "uncertain" terms. (Pet. at 21). Petitioner attempts to inject these terms into the *Bruch* test despite the fact that *Bruch* does not use these as touchstones of a grant of discretionary authority. Nothing in *Bruch* requires that the administrator be "independent;" in fact, lack of independence, as explained *supra* in Part II, is a factor to be weighed *after* the abuse of discretion standard has been found to be applicable. Similarly, nothing in *Bruch* requires the grant to be one of "explicit irrevocable" authority or to specify that it applies solely to "uncertain" terms.

Moreover, the Court of Appeals in *Lowry II* thoroughly reviewed the language of the Plan in view of *Bruch*. The Court held that the requisite discretion was granted, noting, "We reach our result as a matter of law because the relevant plan language is not ambiguous." *Lowry II*, 891 F.2d at 525, n.5. It is important to note that Petitioner does not claim that the Court of Appeals has misconstrued the meaning of the Plan terms, only that the terms do not grant the type of discretionary authority that Petitioner alleges must be granted. Respondents, apparently as was the Court of Appeals, are at a loss to know how much closer the grant of discretion could be to the type envisioned in *Bruch*.

Further, the test as read and applied in *Lowry II* is consistent with other post-*Bruch* decisions. In *Boyd*, for

example, the Court of Appeals for the Fourth Circuit reviewed the plan at issue to determine whether it granted "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 873 F.2d at 59, quoting *Bruch*, ___ U.S. at ___, 109 S.Ct. at 956. The court held that the requisite discretion was granted, in that the plan terms gave the trustees power to make " 'full and final determination as to all issues concerning eligibility of benefits' " and " 'to promulgate rules and regulations to implement this Plan. . . .' " *Boyd*, 873 F.2d at 59. *See also* the cases set forth in *Appendix B* hereto.

Petitioner has misread the test spelled out in *Bruch*. The Court of Appeals decision in *Lowry II*, finding that the requisite discretionary authority was granted, squares with the holdings in *Bruch* and other post-*Bruch* cases. This Court should reject Petitioner's third argument for granting a writ.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari. The reasons asserted by Petitioner for granting the writ are devoid of any issue that warrants this Court's review. There is no conflict of authority, direct or tangential, between *Lowry II* and *Bruch*, *Boyd* or any other relevant case. This Court should not allow Petitioner to have a fourth grab at the ring, his having already argued and lost the issues raised in the Petition, with full and complete treatment of *Bruch*-related issues.

For the reasons set forth in this Brief and for the reasons stated by the Court of Appeals in *Lowry II*, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Excerpts from February 1, 1988 trial testimony of Donald A. Lowry

* * *

Q (By Mr. Adams) Now, at some point in time, Mr. Lowry, did you contemplate – Well, hold on, I think I've left something out. Before I go on to this, let me ask you. Back in 1979 when you were talking with Mr. Coffman about accepting a change in position and accepting a general agency contract, Exhibit 2, did you discuss or contemplate retirement benefit treatment for your 1099 income?

MR. REYNOLDS: Your Honor, I object to that question as compound and as calling for, apparently calling for an agreement that would vary the terms of the written documents that Plaintiff has already put in evidence.

THE COURT: Overruled.

A Yes. My most important concern in March or a little prior to 79 was to remain on the company payroll. I had already had approximately, I guess, twenty-nine years or thirty years, whatever it may have been, and I did not want to give up my retirement program. Mr. Coffman said, "All right, fine." How does it work? He says, "As long as you're on the company payroll you remain in the pension program." The agreement was that, yes, I would do this under the conditions, and that was my most important condition was that I would remain in the company program. Mr. Coffman was not an expert on the program, he didn't really know too much about it. He was rather new, I believe less than two years with the corporation. But in any event, that was my consideration

to him that I would do this if I remained in the company pension program, retirement program.

Q (By Mr. Adams) And at that time you knew in order to do that, you had to remain on the home office payroll?

A That's right.

Q Okay. And as far as you know, have you always remained on the home office payroll?

A I've always been on the home office payroll.

[Lowry-Direct-Tr.38/39; J.A. 81/82]

* * *

Q Well, your position is that the pension plan benefits were to be included and that was part of the deal from the outset?

A Yes.

Q Now, when you said you talked to Mr. Coffman about staying in the pension plan this morning, I take it you didn't discuss those commissions as a separate item?

A I did not.

Q You just said, "I want to stay in the pension plan?"

A Correct.

Q Mr. Coffman, as you said, he was new in the company, he didn't know what the provisions were, correct?

A I didn't know the provisions either, neither one of us did, but I knew a little bit more about it than he did.

Q Well, you know there's no dispute between us, between you and our clients, on the fact that you continued to be a participant in the pension plan, correct?

A Correct.

Q Right?

A Correct.

Q And that transition salary which has now been introduced in the record as Plaintiff's Exhibit 3 for Seventy-Six Thousand Dollars for 1979, you understand that contributions for the pension plan were made for every dime of that?

A Yes.

[Lowry-Cross-Tr.103/104; J.A. 111/112]

* * *

Q Mr. Lowry, you admit that you're entitled to only those benefits that the plan covers; isn't that correct?

A Yes sir.

Q We don't have a dispute about realiy what somebody said or didn't say was included, we have the dispute about whether you're in the plan for the purpose of those 1099 commissions, correct?

A That's correct.

Q No special deal for Don Lowry?

A No sir.

Q That was your understanding then and now?

A Yes sir.

* * *

[Lowry-Cross-Tr.122/123; J.A. 120-A/121]

APPENDIX B

As of the date of this writing, the three cases remanded by this Court on February 27, 1989 (*DeGeare v. Slattery Group, Inc.*, No. 87-2070, 57 U.S.L.W. 3569 (U.S. Feb. 27, 1989), *vacating and remanding* 837 F.2d 812 (8th Cir. 1988); *Combustion Engineering, Inc. v. Saporito*, No. 88-163, 35 U.S.L.W. 3569-70 (U.S. Feb. 27, 1989), *vacating and remanding* 843 F.2d 666 (3rd Cir. 1988); and *Rowe v. Allied Chem. Hourly Employs.*, No. 88-729, 57 U.S.L.W. 3570 (U.S. Feb. 27, 1989), *vacating and remanding* 852 F.2d 569 (6th Cir. 1988)) for further consideration in light of *Bruch* have not been reported in published form.

A. This Court's decision in *Bruch* has been applied, interpreted or cited by United States Courts of Appeal in the following cases, in addition to the Court of Appeals in *Lowry II*:

1. *Batchelor v. International Bhd. of Elec. Workers Local 861 Pension & Retirement Fund*, 877 F.2d 441, 442-43 (5th Cir. 1989) (July 20, 1989) (citing *Lowry II*, the abuse of discretion standard was applied in light of *Bruch* to review trustees' calculation of employee's past service credits since trustees were granted broad discretionary authority to interpret the terms of the pension plan).

2. *International Bhd. of Elec. Workers, AFL-CIO, Local 47 v. Southern Cal. Edison Co.*, ___ F.2d ___, No. 88-6075 (9th Cir. July 18, 1989) (WESTLAW, 1989 WL 78170) (labor organization's breach of contract claim remanded for determination under *de novo* standard of review required by application of *Bruch* since employer was not given discretionary authority under the terms of the disputed health care plan).

3. *Parsons v. West Va. Works Hourly Employees Pension Plan*, ___ F.2d ___, No. 88-2649 (4th Cir. July 18, 1989) (WESTLAW, 1989 WL 78124) (denial of incapacity retirement benefits under pension plan governed by ERISA reviewed *de novo* under *Bruch* since pension plan did not confer upon its administrator discretionary authority to construe the plan's terms).

4. *Sherlund v. Lincoln Nat'l Life Ins. Co.*, (to be reported at: 878 F.2d 1436 (Table)), Unpublished Disposition, No. 88-1585 (6th Cir. July 13, 1989) (WESTLAW) (when trustee of an ERISA plan is not granted discretion, under *Bruch*, his determinations under the benefit plan will be reviewed *de novo*).

5. *Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37, 39 (11th Cir. 1989) (July 11, 1989) (withholding of medical benefits under self-funded employee benefit plan was held unlawful under ERISA applying arbitrary and capricious standard of review which was deemed appropriate under *Bruch* since plan's trustees were granted discretion to construe provisions of the trust).

6. *Curtis v. Noel*, 877 F.2d 159, 161 (1st Cir. 1989) (June 21, 1989) (following *Bruch*, *de novo* standard of review did not apply to retired insurance company employee's claim seeking an upward recalculation of his retirement benefits since admininstrator of retirement plan had discretionary authority to interpret terms of the plan).

7. *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 550 (6th Cir. 1989) (June 7, 1989) (action challenging employer's computation of severance pay benefits remanded to district court for *de novo* review in view of *Bruch* since employer had not been granted discretion to determine benefit eligibility).

8. *Brundage-Peterson v. Compcare Health Servs. Ins. Corp.*, 877 F.2d 509, 511-12 (7th Cir. 1989) (June 5, 1989), (new standard of review in light of *Bruch* is the *de novo* standard unless the administrator or fiduciary of the subject benefit plan is granted discretionary authority to determine eligibility for benefits or to construe the terms of the plan).

9. *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1079 (4th Cir. 1989) (May 19, 1989) (*de novo* standard of review was applied pursuant to *Bruch* to terminated employee's action seeking to require retirement committee to disclose its reasons for denying claimant early retirement benefits since the committee was not vested with discretionary authority).

10. *Schultz v. Metropolitan Life Ins. Co.*, 872 F.2d 676, 678 (5th Cir. 1989) (May 12, 1989) (district court's review of health insurance plan administrator's denial of former employee's claim tested in light of *Bruch* based on *de novo* standard of review since insurance plan did not give its administrator discretionary authority to determine benefit eligibility or to construe the plan's terms).

11. *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 541, 544-45 (8th Cir. 1989) (May 10, 1989) (since employer had discretionary power to construe the uncertain terms in its employee benefit plan, arbitrary and capricious standard was applied in light of *Bruch* to class action brought by employees to determine whether employer's denial of severance benefits was unlawful under ERISA).

12. *Burnham v. Guardian Life Ins. Co. of Am.*, 873 F.2d 486, 489 (1st Cir. 1989) (May 3, 1989) (remand not necessary in light of *de novo* standard of review set forth in *Bruch* since district judge made alternative finding that regardless of whether a deferential standard of review or a more stringent test

was applied, plaintiff's death benefit claim was reasonably refused).

13. *Gunderson v. W.R. Grace & Co. Long Term Disability Income Plan*, 874 F.2d 496, 498-99 (8th Cir. 1989) (May 3, 1989) (without stating which standard of review applied, affirmed the district court's grant of summary judgment in favor of plaintiff, finding that the disability income plan's decision to terminate plaintiff's benefits was unreasonable under either an arbitrary and capricious standard or under the *de novo* standard).

14. *Rife v. United Mine Workers of Am. Health & Retirement Funds*, 875 F.2d 316 (Table), Unpublished Disposition, No. 88-2871 (4th Cir. May 2, 1989) (WESTLAW) (affirmed grant of summary judgment in favor of retirement fund trustees' holding that even if district court had applied the *de novo* standard of review set forth in *Bruch*, the district court would have correctly ruled that the plaintiff was ineligible for pension benefits under the disputed pension plan).

15. *Bali v. Blue Cross & Blue Shield Ass'n.*, 873 F.2d 1043, 1047 (7th Cir. 1989) (May 1, 1989) (*de novo* standard of review inappropriate under *Bruch* since administrator of employee benefit and compensation committee had been vested with discretionary authority).

16. *Boyd v. Trustees of the United Mine Workers Health & Retirement Funds*, 873 F.2d 57, 59 (4th Cir. 1989) (Apr. 21, 1989) (trustees' decision to deny claimant's disability pension benefits reviewed under abuse of discretion standard under *Bruch* since trustees of pension plan had discretionary authority to make benefit eligibility determinations).

17. *Rodriquez v. MEBA Pension Trust*, 872 F.2d 69, 73 (4th Cir. 1989) (Apr. 7, 1989) (decision did not depend upon the standard of review applied, but

Bruch was interpreted as holding that benefit eligibility determinations by plan trustees are subject to *de novo* review absent a plan provision for the exercise of discretion by trustees).

B. This Court's decision in *Bruch* has been applied, interpreted or cited by United States District Courts in the following cases:

1. *Jordan v. Reliable Life Ins. Co.*, ___ F.Supp. ___, No. 88-AR-0543-S (N.D. Ala. July 3, 1989) (WESTLAW, 1989 WL 73303) (*Bruch* did not affect the standard of review applied to fiduciary's denial of beneficiary's life insurance claim since fiduciary conceded at trial that its denial of beneficiary's claim should be reviewed *de novo*).

2. *Kocman v. Safeguard Business Sys.*, (Not Reported in F.Supp.), No. 88-5127 (E.D. Pa. June 28, 1989) (WESTLAW, 1989 WL 71492) (arbitrary and capricious standard applied in light of *Bruch* since defendant's employee benefits plan gave its administrator discretionary authority to determine eligibility for benefits).

3. *Davidson v. St. Francis Regional Medical Center Employee Group Health Plan*, ___ F.Supp. ___, No. A88-2528-S (D. Kan. June 9, 1989) (WESTLAW, 1989 WL 78261) (*de novo* standard was applied in light of *Bruch* in reviewing the denial of certain medical benefits under a health care plan since the plan in question did not give its administrator discretionary authority to make eligibility determinations or to construe the terms of the plan).

4. *Kelley v. American Tel. & Tel. Co.*, ___ F.Supp. ___, No. 88-2030-S (D. Kan. June 9, 1989) (WESTLAW, 1989 WL 78256) (applied *de novo* standard of review in light of *Bruch* without mention of alternate standard which would apply if administrator had discretion to review employer's denial of plaintiff's separation benefits).

5. *Stingley v. Tenco,* (Not Reported in F.Supp.) No. 88 C 2085 (N.D. Ill. June 8, 1989) (WESTLAW, 1989 WL 65039) (employer's decision to terminate plaintiff's leave of absence would not be disturbed unless it was an abuse of discretion under *Bruch* since decision to extend leave of absence was within employer's discretion).

6. *Reeser v. Esmark, Inc., Pension Bd.,* 714 F.Supp. 412 (S.D. Iowa 1989) (June 6, 1989) (district court held that, under *Bruch* requirements, plan administrator was granted sole discretion to interpret meaning and intent of plan and, therefore, court considered alleged errors of law in interpreting plan terms under arbitrary and capricious, rather than *de novo,* standard).

7. *Questech, Inc. v. Hartford Accident & Indem. Co.,* 713 F.Supp. 956, 962-63 (E.D. Va. 1989) (June 1, 1989) (even where no discretion was granted, *de novo* standard of review was not appropriate where insurance company denied plaintiff's claim under an accidental death policy since the question decided by the plan fiduciary was a factual one, not one of plan construction).

8. *Stewart v. Borg-Warner Corp.,* (Not Reported in F.Supp.) No. 88 C 4258 (N.D. Ill. May 30, 1989) (WESTLAW, 1989 WL 58235) (*de novo* standard of review applied in light of *Bruch* since the disability plan did not give its administrator discretionary authority to construe the terms of the plan).

9. *Goggans v. Container Corp. of Am.,* 714 F.Supp. 282, ___, No. 1-87-467 (S.D. Ohio May 26, 1989) (WESTLAW) (action brought by former employees seeking severance pay is subject to *de novo* review rather than review under an arbitrary and capricious standard unless the benefit plan gives its administrator or fiduciary discretionary authority to determine benefit eligibility or to construe the terms of the plan).

10. *Adams v. Avondale Indus., Inc.*, 712 F.Supp 1291, 1294 (S.D. Ohio 1989) (May 22, 1989) (*de novo* standard of review applied in determining whether the defendants violated §1132(a)(1)(B) in denying plaintiffs' benefits under an unwritten severance plan since there was no evidence that the plan vested its administrator or fiduciary with discretionary authority).

11. *Filary v. General Am. Life Ins. Co.*, 711 F.Supp. 528, 530 (D. Ariz. 1989) (May 12, 1989) (fiduciary's denial of plaintiff's medical expense reimbursement claim not reviewed *de novo* since fiduciary's decision was based on discretionary authority).

12. *Bilka v. Blue Bell, Inc.*, 712 F.Supp. 509 (M.D.N.C. 1989) (May 11, 1989) (since the plan terms granting discretionary power to the administrator to determine which terminations receive the qualifying layoff designation meet the standard outlined in *Bruch* for a grant of discretionary authority, administrator's decision upheld under an abuse of discretion standard, *i.e.* whether there was a reasonable basis for the administrator's decision, as required by *Bruch* where such discretion is granted).

13. *Brunner v. Sun Ref. & Mktg. Co.*, (Not Reported in F. Supp.), 29 Wage & Hour Cas. (BNA) 505, No. 86 C 20272 (N.D. Ill. May 10, 1989) (WESTLAW, 1989 WL 57710) (defendants' motion for summary judgment denied as a result of new *de novo* standard set forth in *Bruch* for reviewing claims for denial of benefits under ERISA, without mention of alternate standard regarding whether discretion was granted to administrator or fiduciary).

14. *Doza v. Crum & Forster Ins. Co.*, ___ F.Supp. ___, (D.N.J. May 8, 1989) (WESTLAW, 1989 WL 73467) (based on analysis of administrator's denial of benefits under an exclusion in coverage under the terms of the plan, held that the administrator erred both under a *de novo* standard, where the

evidence showed the exclusion was not applicable, and under an abuse of discretion standard, where the court found that the administrator operated under a conflict of interest and that the administrator applied an exclusion other than that outlined in the plan).

15. *Tomczyk v. Blue Cross & Blue Shield United of Wis.*, ___ F.Supp. ___, No. 88-C-690 (E.D. Wis. May 8, 1989) (WESTLAW, 1989 WL 70377) (court requests parties to supplement their briefs with discussion of *Bruch* while holding in abeyance defendant's motions for summary judgment and jury trial).

16. *Wallace v. Cavenham Forest Indus., Inc.*, 707 F.Supp. 455, 461 (D. Or. 1989) (May 8, 1989) (on motion for reconsideration in view of *Bruch*, district court applied *de novo* standard to review unambiguous plan provisions, and without addressing issue of whether plan administrator was granted discretion, found the same result as under its initial arbitrary and capricious review).

17. *Hill v. Bethlehem Steel Corp.*, (Not Reported in F.Supp.), Nos. 87-7763, 87-7764 (E.D. Pa. May 6, 1989) (WESTLAW, 1989 WL 60441) (granting defendant employer's summary judgment motion, court assumed that the *de novo* standard of review would be applied in light of *Bruch* since the applicable section of the subject pension plan did not involve discretionary considerations).

18. *Holian v. Leavitt Tube Co., Inc.*, (Not Reported in F.Supp.), No. 89 C 0354 (N.D. Ill. Apr. 28, 1989) (WESTLAW, 1989 WL 44570) (retroactive change in valuation dates by employer, resulting in significant reduction in plaintiff's benefits under profit sharing plan, was not subject to *de novo* review under *Bruch* since the plan committee was provided discretionary authority to construe the plan in determining eligibility).

19. *Retirement & Sec. Program v. Oglethorpe Power*, 712 F.Supp. 223, 226 (D.D.C. 1989) (Apr. 25, 1989) (under *Bruch*, the terms "the Committee shall have authority to determine all questions arising in connection with the Program, including its interpretation" grant discretion to the administrator, and therefore, administrator's decision should be reviewed under an arbitrary and capricious standard and not a *de novo* standard).

20. *Paul v. Valley Truck Parts, Inc.*, (Not Reported in F.Supp.), No. 88 C 7131 (N.D. Ill. Apr. 19, 1989) (WESTLAW, 1989 WL 44586) (in light of *Bruch*, defendant's actions and decisions concerning separation pay was reviewed *de novo* except insofar as defendant had been granted discretionary authority to determine eligibility or to construe the terms of the plan).

21. *Schiller v. Mutual Benefit Life Ins. Co.*, 713 F.Supp. 1064, 1065-66 (E.D. Tenn. 1989) (Apr. 11, 1989) (if an ERISA plan does not provide discretionary or final authority to an employer or administrator to construe uncertain contract terms, under *Bruch*, courts should review the employee's claim *de novo*).

22. *Rizzo v. Caterpillar, Inc.*, (Not Reported in F.Supp.), No. 88 C 0080 (N.D. Ill. Apr. 3, 1989) (WESTLAW, 1989 WL 36411) (noting that little guidance was available at the time of the court's decision on what constitutes an abuse of discretion under *Bruch* in reviewing a denial of ERISA benefits, the court held employer's decision to deny retirement benefits was an abuse of discretion since the benefits were denied by individuals without discretionary authority).

23. *Sandifer v. Central States S.E. & S.W. Areas Pension Fund*, 709 F.Supp. 713, 716 (E.D. La. 1989) (Mar. 30, 1989) (defendant fell within exception to *de novo* review under *Bruch* since the trustees of the pension plan were exercising discretionary

authority specifically vested in them by the trust instrument when they determined plaintiff's pension benefit eligibility within the language of the plan requirements).

24. *Ferrara v. Allentown Physician Anesthesia Assocs., Inc.*, 711 F.Supp. 206, 209 (E.D. Pa. 1989) (Mar. 28, 1989) (arbitrary and capricious standard of review applied to plaintiff's action against employer's pension and profit sharing plans under *Bruch* since language of the subject plans gave plan administrator sufficient discretionary authority to interpret the plan's language).

25. *Garavuso v. Shoe Corps. of Am. Indus., Inc.*, 709 F.Supp. 1423, 1425-26 (S.D. Ohio 1989) (Mar. 22, 1989) (employer's decision to deny severance benefits was subject to *de novo* review in light of *Bruch* since the benefit plan did not grant employer the deferential power to construe uncertain terms of the plan or to make eligibility determinations).